No. 83-154

In the Supreme Court of the United States

OCTOBER TERM, 1983

TITLE INSURANCE RATING BUREAU OF ARIZONA, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether private collective rate agreements among escrow agents are "state action" and therefore not subject to the Sherman Act, when the state neither compels joint ratemaking instead of independent individual pricing nor expresses a policy favoring joint ratemaking.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-11a) is reported at 700 F.2d 1247. The opinion of the district court (Pet. App. 12a-25a) is reported at 517 F. Supp. 1053.

JURISDICTION

The judgment of the court of appeals was entered on March 7, 1983. On June 29, 1983, Justice Rehnquist extended the time in which to file a petition for a writ of certiorari to August 1, 1983, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is a title insurance rating bureau licensed by the State of Arizona. It has 13 title insurer members and additional non-voting insurance agent subscribers which are

engaged in the business of title insurance. Pet App. 2a. Petitioner performs various functions: (1) it establishes schedules of title insurance rates for its members and subscribers; (2) it establishes schedules of rates for escrow services performed by its members and subscribers; and (3) it conducts studies for the purpose of developing its various rate schedules, and files those schedules with the appropriate state regulatory bodies. Only the legality of the second function — the joint setting of escrow service fees — is at issue in this litigation.

Before 1977, Arizona law required title insurers to file only their title insurance rates with the state director of insurance. In 1977, state law was amended to require the filing of rates charged by title insurers for escrow services.[1] State law allows such a provider of escrow services to choose between filing an independent rate, on the one hand, and agreeing with competitors on uniform rates, on the other. Agreed-upon rates are filed on behalf of the agreeing insurers by a licensed titled insurance rating organization such as petitioner. State law further provides that any member or subscriber of a title insurance rating organization may file a deviation from the rates filed by such an organization. Also, a title insurer, agent, or title insurance rating organization may withdraw a filing or a part thereof at any time. Pet. App. 2a, 4a; Ariz. Rev. Stat. Ann. §§ 20-375, 20-376, 20-378. A, 20-379 (1975 & Supp. 1982-1983).

In October and November 1977, petitioner's board of directors held a series of meetings at which rates for escrow services performed by title insurers and their agents were discussed and classified. The board agreed on a schedule of escrow service rates and authorized its submission to the

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[1]Escrow agents not serving as title insurers or title insurance agents are not subject to these rate filing requirements.

director of the Arizona Department of Insurance. Subsequent amendments and revisions were also filed. Pet. App. 2a.

Under Arizona law, the rate filing automatically becomes effective after a 15-day waiting period, unless the Director of Insurance holds a hearing and disapproves it. The Director may extend the waiting period or authorize a filing to become effective before the expiration of the waiting period. Ariz. Rev. Stat. Ann. § 20-376.E (Supp. 1982-1983). The Director did not hold a hearing on, or disapprove, petitioner's proposed rates, and the parties stipulated in the district court that the Director has never disapproved an escrow rate. Stip. para. 60.[2] Moreover, the Director of Insurance did not conduct an examination of petitioner's accounts and records as required by state law (Stip. para. 59; Ariz. Rev. Stat. Ann. § 20-370 (1975)). Stip. para. 59, 60.

2. The government brought this action under Section 4 of the Sherman Act, 15 U.S.C. 4, to enjoin petitioner from engaging in continuing violations of Section 1 of the Sherman Act, 15 U.S.C. 1. The government did not seek damages. No state agencies or state officials were named as defendants by the government and the government did not seek to enjoin any state regulatory functions; indeed, the State of Arizona filed a complaint similar to that of the United States. Pet. App. 15a.

The government alleged that petitioner and its members and subscribers engaged in an illegal combination to fix and maintain fees for escrow services in the State of Arizona in restraint of interstate commerce. Petitioner conceded that its members discussed escrow services and rates and agreed on schedules of uniform prices for escrow services. Stip.

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[2] "Stip." refers to the parties' stipulation, which is docket entry 30 in the district court record.

para. 8. Petitioner asserted that this conduct did not violate the Sherman Act for several reasons. In this Court it has abandoned all its contentions except its claim that its conduct was immunized from antitrust liability by actions of the State of Arizona.

The United States District Court for the District of Arizona granted the government's motion for summary judgment. Pet. App. 12a-25a. The court rejected petitioner's claim of "state action" immunity on the ground that this Court's decisions established that privately imposed restraints of trade could not be deemed state action exempt from the federal antitrust laws unless they were compelled by the state. *Id.* at 20a, citing *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773 (1975), and *Cantor* v. *Detroit Edison Co.*, 428 U.S. 579 (1976). Here, the court found (Pet. App. 21a; citations omitted):

> The State of Arizona does not compel the title insurance companies to charge a uniform rate for escrow services. * * * In three separate provisions the legislature provides that a title insurer has the choice of filing its own escrow rates or having its rates filed by a rating organization. * * *
>
> * * * Further, the history of the escrow legislation reveals that the legislature explicitly decided not to give title insurers and agents immunity from the state antitrust laws. * * * Proponents of the legislation stressed the competitive features of the law in testimony before the legislature.

3. The court of appeals affirmed. Pet. App. 1a-11a. It reasoned (*id.* at 11a; footnote and citations omitted, emphasis added):

> [T]he state does not require uniform rates: it allows a title insurer to file independent rates separately, to file independent rates through a rating bureau, or to deviate from rates filed by a rating bureau on its behalf.

> The most that can be said for [petitioner's] position is that the statute *authorizes* cooperative action in ratemaking. This does not constitute a clearly articulated and affirmatively expressed state policy to restrict competition.

The court based these conclusions on the language of the governing statute itself, which provides (*ibid.*, quoting Ariz. Rev. Stat. Ann. § 20-341 (1975)):

> Nothing in this article is intended to prohibit or discourage reasonable competition, or to prohibit or encourage, except to the extent necessary to accomplish the purpose stated in this section, uniformity in insurance rates * * *.

The court of appeals explained that "[t]his reflects neutrality by the Arizona legislature to competition and uniform rates, not 'a clearly articulated and affirmatively expressed state policy.' " Pet. App. 11a; citation omitted.

ARGUMENT

Petitioner no longer disputes that the challenged collective rate agreements constitute price fixing that would ordinarily be per se unlawful under the Sherman Act. Petitioner's sole contention is that the agreements are exempt from the Sherman Act under the "state action" doctrine. This contention is foreclosed by the decisions of this Court and by the logic of the "state action" exemption, both of which deny "state action" immunity to private conduct unless it is compelled by the state. Moreover, even if this Court were to overrule its prior decisions and apply a less rigorous standard to competitive restraints imposed by private conduct, the court of appeals correctly concluded that the Arizona statutory scheme does not reflect a clear policy in favor of replacing prices competition with regulated concerted price fixing by the providers of escrow services. Thus, plenary review is unwarranted.

1. Petitioner asserts that the court of appeals rejected its contention because the court believed that the state action exemption cannot be invoked unless a party shows that its anticompetitive action was compelled by the state. See Pet. 11, 14. Relying on *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980), petitioner contends that it need not show compulsion by the state. Specifically, petitioner asserts that it is entitled to "state action" immunity here because it showed that its price-fixing was in accordance with "a clearly articulated and affirmatively expressed state policy" (Pet. 12-13).

In our Brief in Opposition in *Southern Motor Carriers Rate Conference, Inc.* v. *United States*, petition for cert. pending, No. 82-1922 (filed May 27, 1983), we explained why this Court's decisions and the rationale of the state action exemption require a private party seeking to invoke that exemption to show that its anticompetitive actions were compelled by the state. 82-1922 Br. in Opp. 9-17.[3] We also explained why different standards apply when an agency of government — instead of a private party — is named as a defendant, or when a suit seeks to enjoin the operation of a state statute. In those circumstances "state action" immunity can be invoked by showing a clearly articulated state policy to displace competition in the activity at issue, the implementation of which is closely supervised by the state. *Id.* at 13-14 n.8. We further explained why *Midcal* is fully consistent with these principles. *Id.* at 15-16.[4]

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[3]We have sent a copy of this brief to counsel for petitioner.

[4]Petitioner also relies (Pet. 12 n.16) on *New Motor Vehicle Board* v. *Orrin W. Fox Co.*, 439 U.S. 96 (1978). In that case, a state agency was empowered to disapprove the opening of new retail automobile dealerships, but it would undertake an inquiry into whether to disapprove a

Both courts below found, and petitioner acknowledges (Pet. 2, 14), that title insurers in Arizona are not compelled to fix and file uniform rates. As we noted, the United States neither sued governmental defendants nor sought to enjoin the operation of a state program. It follows that, for the reasons we stated in our Brief in Opposition in *Southern Motor Carriers*, petitioner cannot claim state action immunity.

Petitioner asserts (Pet. 14-16) that the decision of the court of appeals conflicts with decisions in several other circuits that, according to petitioner, do not require a party

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proposed new entry only if a protest was lodged by a competing dealer. *Id.* at 98, 103.

The Court in *Orrin Fox* concluded that the *state agency's* anticompetitive actions were state action, and therefore exempt from the Sherman Act, because they were part of "a system of regulation, clearly articulated and affirmatively expressed, designed to displace unfettered business freedom" (439 U.S. at 109). As we have said, this standard is indeed applicable to the actions of units of government.

But the Court in *Orrin Fox* did not exempt the *private* conduct from the Sherman Act for this reason. The Court stated that the private conduct was immune not under the "state action" exemption but under the so-called *Noerr-Pennington* doctrine (439 U.S. at 110): "Protesting dealers who invoke in good faith their statutory right to governmental action in the form of a Board determination that there is good cause for not permitting a proposed dealership do not violate the Sherman Act, *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), and *Mine Workers* v. *Pennington*, 381 U.S. 657, 670 (1965)." Indeed, the court in *Orrin Fox* squarely stated that the state had *not* "attempted to authorize and immunize private conduct violative of the antitrust laws" (*ibid.*); thus the Court made it clear that the state action exemption was not relevant to the assessment of the private conduct.

We note that no Justice dissented from the Court's discussion of the antitrust issue in *Orrin Fox* and that the opinion in no way intimated that it was inconsistent with the compulsion requirement made explicit in *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773 (1975), and *Cantor* v. *Detroit Edison Co.*, 428 U.S. 579 (1976).

to show compulsion in order to invoke the state action exemption. Petitioners in *Southern Motor Carriers* made a similar claim about three of the decisions relied upon by petitioner here — *Town of Hallie* v. *City of Eau Claire*, 700 F.2d 376 (7th Cir. 1983), petition for cert. pending, No. 82-1832 (filed May 11, 1983); *Caribe Trailer Systems, Inc.* v. *Puerto Rico Maritime Shipping Authority*, 475 F. Supp. 711 (D.D.C. 1979), aff'd per curiam, No. 79-1658 (D.C. Cir. July 3, 1980), cert. denied, 450 U.S. 914 (1981); *Turf Paradise, Inc.* v. *Arizona Downs*, 670 F.2d 813 (9th Cir.), cert. denied, 456 U.S. 1011 (1982). Our explanation of why those decisions do not conflict with the court of appeals' decision in *Southern Motor Carriers* applies equally to petitioner's contention here. See 82-1922 Br. in Opp. 17-18.[5] Petitioner also relies on *Gold Cross Ambulance & Transp.* v. *City of Kansas City*, 705 F.2d 1005 (8th Cir. 1983), petition for cert. pending, No. 83-138 (filed July 25, 1983). But as petitioner acknowledges (Pet. 16), that case, like *Town of Hallie* v. *City of Eau Claire, supra*, involved only a municipal defendant and therefore did not address the question whether state compulsion is required to establish a private party's state action immunity.[6]

2. Even if the Court does not accept the position we advance in *Southern Motor Carriers*, petitioner's claim does not merit further review. Petitioner, relying on *Midcal*,

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[5]We also note that *Turf Paradise* was an earlier decision by the Ninth Circuit and therefore presents, at most, a conflict within a circuit, which this Court does not ordinarily review. *Wisniewski* v. *United States*, 353 U.S. 901 (1957).

[6]Petitioner may also assert a conflict with another Eighth Circuit decision, *First American Title Co.* v. *South Dakota Land Title Ass'n*, No. 82-1753 (Aug. 11, 1983). But as the court there carefully emphasized (slip op. 19), that decision, too, did not involve the application of the state action exemption to the anticompetitive acts of private parties; it was a challenge to state statutes and the actions of a state regulatory agency.

asserts that the correct test to apply to its conduct is whether its actions were pursuant to a "clearly articulated and affirmatively expressed state policy." Pet. 11; see *id.* at 16. But the court of appeals (Pet. App. 11a) and the district court (*id.* at 21a) both found that Arizona does not have such a policy in favor of uniform rate-setting, and their rulings were correct. Thus petitioner is not entitled to prevail even if this Court adopts the standard it embraces.[7]

a. As the courts below noted, the plain language of the Arizona statute shows that the state did not adopt a policy favoring the uniformity of rates. The district court noted that the statute makes it clear that title insurers may file individual rates, and the court of appeals quoted statutory language expressly eschewing an intent to discourage competition or to promote uniform rates. Pet. App. 11a, 21a; see pages 4-5, *supra*. Moreover, the Arizona statute expressly authorizes members and subscribers of rating bureaus to file deviations from their rating organization's rates precisely "so that competitive rates may inure to the benefit of the public." *Pacific Fire Rating Bureau* v. *Insurance Co. of North America*, 83 Ariz. 369, 375, 321 P.2d 1030, 1034 (1958).

Indeed, petitioner appears to concede that the state was "indifferen[t] as between joint and individual rate filings" (Pet. 14 n.19). As the Court has made clear, such legislative neutrality does not amount to the clear articulation of a state policy to displace competition that is required to exempt conduct from the Sherman Act. In *Community Communications Co.* v. *City of Boulder*, 455 U.S. 40

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[7]Indeed, the court of appeals suggested that the Arizona statute merely authorized a rating bureau like petitioner to prepare and file rates separately determined by individual escrow providers. Pet. App. 11a n.2. Under this interpretation, the challenged price-fixing was not even *authorized* by state law, much less affirmatively expressed.

(1982), for example, the Court held that a municipality's moratorium on cable television expansion was not within the state action exemption even though it was authorized by the state constitution's grant of regulatory powers to municipalities, because the state was neutral on the question whether municipalities could restrain the expansion of cable television. The Court ruled (*id.* at 55): "[P]lainly the requirement of 'clear articulation and affirmative expression' is not satisfied when the State's position is one of mere *neutrality* respecting the municipal actions challenged as anticompetitive."

The Court further explained that it "would wholly eviscerate the concepts of 'clear articulation and affirmative expression' that our precedents require" to hold that those criteria are satisfied when one municipality "can pursue its course of regulating cable television competition, while another * * * can choose to prescribe monopoly service, while still another can elect free-market competition" (*id.* at 56). Similarly, here, some title insurers and agents can strictly adhere to agreed-upon prices for escrow services, while others can adhere generally to the cartel price but deviate in certain circumstances, while still others can file independently competitive prices. All of these actions are equally contemplated and authorized by Arizona law. Accordingly, petitioner's contention that Arizona has a clear policy displacing competition in favor of collective ratemaking is incorrect.

b. The legislative history of the 1977 escrow regulatory statute further demonstrates that Arizona has not adopted a policy of displacing independent escrow rate competition with collective ratemaking. The Arizona legislature rejected a provision that would have given title insurers and their

agents a blanket exemption from state antitrust laws.[8] It also rejected a substitute provision, proposed by the Land Title Association of Arizona, which would have made the state antitrust laws inapplicable to any action by a title insurer (or agent) that was "approved by a statute of this state or the director [of insurance.]" [9] Moreover, the legislature understood that the legislation would permit price competition; the Land Title Association emphasized in the legislative hearings on the bill that the legislation would not set rates "for all title companies uniformly" and that companies could file separate rates.[10]

3. Another aspect of the Arizona regulatory scheme is that the statute specifies certain criteria that the Director of Insurance is to apply in reviewing filed rates. See Ariz. Rev. Stat. Ann. §§ 20-375.A, 20-376.D (Supp. 1982-1983). These criteria are generally designed to protect consumers from excessive rates and insurance companies from insolvency; for example, the rates are to give "due consideration to * * * [t]he necessity, by encouraging growth in assets of title insurers in periods of high business activity, of assuring the financial solvency of title insurers in periods of economic depression" (Ariz. Rev. Stat. Ann. § 20-375.A.2 (Supp. 1982-1983)). Petitioner repeatedly refers to these "non-market criteria" (Pet. 13) and contends that they support its

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[8] As originally proposed, the legislation would have given title insurers and their agents a blanket exemption from legal action under state law. H.B. 2316, Sec. 10, *reprinted in* Leg. Hist. 9. ("Leg. Hist." refers to the package of legislative history materials that we have lodged with the Court and sent to counsel for petitioner.) That provision was rejected by the House Commerce Committee. Leg. Hist. 11.

[9] See Leg. Hist. 16, 17 (amendment adopted by House Committee on Banking and Insurance); *id.* at 20 (amendment rejected by House Committee on Commerce); *id.* at 1 (amendment withdrawn when House considered proposed legislation).

[10] Leg. Hist. 15, 42.

claim to state action immunity. See, *e.g.*, *id.* at 10. It asserts that "the lower courts focused erroneously on the particular procedure by which Arizona requested rates to be filed rather than the substantive criteria that the state established for such rates". See also *id.* at 2-3, 6, 13-14 n.19.

This contention is plainly incorrect. The fact that the state has established these so-called "non-market criteria" suggests nothing about whether it has encouraged or required what amounts to price fixing among title insurers. The government did not seek to enjoin, and the district court did not enjoin, the operation of these criteria in any way. The state is free to enforce these criteria, and petitioner's members are free to file rates consistent with them. The question whether petitioner's members may *agree* upon the rates they file is, however, wholly distinct from the operation of these criteria.[11] As this Court's decisions establish, the fact that the government has established a regulatory regime to ensure that prices will fall within a certain " 'zone of reasonableness' " does not mean that it intends even to

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[11]This Court's decisions make it clear that the fact that a state has decided to substitute regulation for competition with respect to some aspect of an industry's activities does not, by itself, mean that the state has determined that competition has no role to play in the industry. For example, Virginia regulated the entry of lawyers into the profession, thereby departing from the free entry that characterizes unfettered competition, but in *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773 (1975), this Court found no evidence that the state had any policy favoring collective fee-setting. *Id.* at 789. Similarly, in *Cantor* v. *Detroit Edison Co.*, 428 U.S. 579 (1976), Michigan had established a comprehensive system of regulating many of the activities of its electric utilities, but that fact alone did not evidence an intent to displace competition in the sale of light bulbs. *Id.* at 596. In every case, the question is not whether the state has substituted regulation for competition with respect to some aspects of the business involved, but whether the state has clearly articulated a policy of displacing the type of competition allegedly restrained by the challenged action.

permit — much less to encourage or require — anticompetitive activity, such as price-fixing, "within that zone." *Georgia* v. *Pennsylvania R.R.*, 324 U.S. 439, 460-461 (1945) (citation omitted). Here, petitioner concedes that the state did not require agreement on rates, and we have shown that the state did not even establish a policy affirmatively favoring such agreement. Petitioner is therefore not entitled to invoke the state action exemption.[12]

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[12]Petitioner suggests (Pet. 17) that this petition should be disposed of in light of *Hoover* v. *Ronwin*, cert. granted, No. 82-1474 (May 16, 1983). It seems unlikely, however, that this Court's decision in *Ronwin* will affect the questions presented in this case. *Ronwin* is an action against a state agency (the Arizona Supreme Court's Committee on Examinations and Admission), and, as we have noted, the standards that apply to state agencies are different from those that apply to private parties. Thus the issue whether compulsion is necessary to establish a state action defense for a private party is not presented in *Ronwin*. Moreover even if, as petitioner contends, the "clearly articulated state policy" test is applicable to private parties, the decision in *Ronwin* should have little bearing on the question whether that test was satisfied with respect to the conduct at issue in this case. In *Ronwin* the existence of a clearly articulated state policy to limit bar admission on the basis of competence is not disputed; the court of appeals concluded that the factual question whether the state agency's actions further that policy remains to be decided on remand. By contrast the issue here, even if state compulsion is not required, is whether the state has articulated a policy in favor of petitioner's conduct; the nature of that conduct is not in dispute. And as we have pointed out (pages 4-5, 8-11, *supra*), the courts below have clearly determined that petitioner's conduct is not supported by an articulated state policy.

We note that petitioners in *Southern Motor Carriers*, a case which, like the present case, involves private defendants, have not suggested that the Court's decision in *Ronwin* will control their case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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